FILED
031074 JAN 26 2004
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No. 03-

IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES,

Petitioner,

v.

LEGAL SERVICES FOR NEW YORK CITY
and LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where, in response to a pre-answer motion to dismiss under Fed. R. Civ. P. 12(b)(6), a district court dismisses a civil complaint for failure to allege sufficient facts to state a claim, is it permissible for the court to deny plaintiff's request for leave to replead under Fed. R. Civ. P. 15(a) without specifying any reason for such denial simply because the plaintiff did not submit a proposed amended complaint when it requested leave to replead?

2. Are legal services that are funded pursuant to the Legal Services Corporation Act, 42 U.S.C. §§ 2996, *et seq.* ("the LSC Act"), exempt from the requirements of the federal antitrust laws on the ground that such services do not constitute "trade or commerce"?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Bronx Legal Services is a non-profit corporation which does not have any parent corporations or any public stock.

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Appendix B — Memorandum Opinion And Order Of The United States District Court For The Southern District Of New York Dated January 17, 2003 .. 4a

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit (which affirmed a decision of the District Court for the Southern District of New York granting defendants' motion to dismiss the complaint for failure to state a claim) was based on an unpublished opinion (Appendix A) reported in 78 Fed. Appx. 781 (2d Cir. 2003). The decision of the District Court (Appendix B) was not officially reported.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on October 29, 2003.

PROCEDURAL RULES AND STATUTORY PROVISIONS INVOLVED

1. Rule 8(a) of the Federal Rules of Civil Procedure, which provides:

> A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

2. Rule 15(a) of the Federal Rules of Civil Procedure, which provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

3. Section 1 of the Sherman Act (15 U.S.C. § 1)), which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal. . . .

4. Section 2 of the Sherman Act (15 U.S.C. § 2), which provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

STATEMENT OF THE CASE

This case presents for review an important question of federal procedural law that has provoked conflicting and hopelessly inconsistent decisions among the circuit courts, namely, when, and under what circumstances, a plaintiff in a civil case has the right to amend its complaint following a Rule 12(b)(6) dismissal for failure to plead sufficient facts to state a claim. It also presents for review an important question of federal antitrust law, namely, whether a commercial activity (*e.g.*, the provision of legal services) is exempt from antitrust regulation simply because the activity is funded by grants from the federal government and provided at no cost to the ultimate consumers of the service.

Petitioner Bronx Legal Services ("BLS") is a non-profit corporation that has provided free legal assistance in civil matters to indigent persons in Bronx County, New York, for

more than 25 years. Respondent Legal Services Corporation ("LSC") is a non-profit corporation established by Congress in 1974 for the purpose of distributing federal grant money to legal service providers like BLS pursuant to the provisions of the LSC Act. Respondent Legal Services for New York City ("LSNY") is a non-profit corporation that has acted as an agent for coordinating and administering LSC-funded legal services in New York City for the past 25 years.

Until recently, LSNY, BLS and six other legal service providers (called "operating legal services corporations" or "OLSCs")[1] worked closely together to provide free civil legal services to indigent persons in four boroughs of New York City.[2] Such work was funded by various grants and contracts, including grants from LSC. LSNY, BLS and the other OLSCs jointly prepared and submitted periodic grant applications and contract proposals to LSC and various other funding agencies and sources, including various agencies of New York City and New York State. LSNY acted as the "administrative and fiscal agent" for BLS and the other OLSCs in connection with these grants and contracts and, as such, it managed their finances, maintained their financial books and accounts, and processed the payment of most of their expenditures. Although they worked closely together, BLS, LSNY and the other OLSCs were separate corporations, and none was subject to the direct supervision or control of the other.

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1. Besides BLS, the six other "OLSCs" are Bedford Stuyvesant Community Legal Services Corporation, Brooklyn Legal Services Corporation A, Brooklyn Legal Services Corporation B, Harlem Legal Services, Inc., MFY Legal Services, Inc., and Queens Legal Services Corporation ("QLS").

2. The four boroughs (also called counties) are the Bronx, Brooklyn, Manhattan and Queens. A separate arrangement existed with respect to providing legal services in Staten Island.

Beginning in 1998, LSC embarked upon a program which it euphemistically called its "State Planning Initiative" the purpose of which, as described by LSC, was to effectuate the "coordination and integration of [the provision of legal] services on a unified statewide basis" in each state. BLS alleged in the present lawsuit that the actual intent and effect of LSC's program was to systematically reduce the number of legal service providers receiving LSC funds by means of forced consolidations. BLS further alleged that LSC's policy of forced consolidation was arbitrary and capricious and violated the competitive bidding requirement mandated by Congress for awarding LSC grants.

In August of 2000, LSC informed LSNY that it was "imperative" that LSNY begin to implement "the development of a comprehensive and integrated legal service delivery system within New York City." Under pressure from LSC, LSNY, together with the seven OLSCs (including BLS), engaged in an extensive and lengthy planning process to address concerns that had been raised by LSC. At the completion of this process, the Planning Committee recommended that legal services in New York City be consolidated within each county of NYC but not on a city-wide basis. Implementation of this proposal would not have had any effect on the operations or structure of either BLS or QLS, which were already consolidated on a county-wide basis. However, it would have affected the operations of Brooklyn A, Brooklyn B and Bedford-Stuyvesant (which are all located in Brooklyn) as well as Harlem Legal Services and MFY (which are both located in Manhattan). There was no requirement in the plan proposed by the Planning Committee for any of the OLSCs to become controlled subsidiaries of LSNY.

In March of 2001, LSNY unilaterally rejected the recommendation developed by the Planning Committee and decided instead to impose city-wide consolidation.

Thereafter, in November of 2001, LSNY announced that it had developed a plan to take control over the OLSCs. The plan announced by LSNY required that each of the legal service corporations in New York City that were presently receiving funds from LSC (including BLS) had to agree to become a wholly-owned subsidiary of LSNY (and thus become subject to LSNY's management and control) in order to continue receiving LSC funds in the future. BLS and most of the other OLSCs vehemently objected to LSNY's proposed takeover plan, but LSNY insisted that they either submit to LSNY's plan or lose all further funding.

Since LSNY threatened to terminate BLS's funding unless BLS agreed to LSNY's proposed restructuring plan, on August 5, 2002, BLS commenced the present lawsuit against LSNY and LSC for declaratory and injunctive relief. The complaint alleged eight claims based upon the following legal theories: (i) violation of the LSC Act on the ground that LSC's consolidation initiative and LSNY's proposed restructuring plan were arbitrary and capricious and violated the requirement for competitive bidding; (ii) violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; (iii) violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (iv) violation of Section 340 of New York's General Business Law (a state antitrust claim similar to the Sherman Act); (v) deprivation of civil rights (on the ground that LSC and LSNY were motivated by a desire to retaliate against BLS and QLS for commencing a prior lawsuit against them); (vi) violation of Section 495 of New York's Judiciary Law (which regulates the practice of law by corporations); (vii) breach of LSNY's fiduciary duty to BLS; and (viii) tortious interference with BLS's contractual relations and business opportunities.

Shortly after the complaint was served and prior to answering, LSC moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). LSNY answered and moved for judgment on the pleadings under

Fed. R. Civ. P. 12(c). Since both of these motions sought identical relief based on exactly the same grounds, the district court treated LSNY's motion as a motion to dismiss under Rule 12(b)(6). *See* App. B at 5a n.1.

In its brief opposing defendants' motions to dismiss the complaint for failure to state a claim, BLS requested that it be granted leave to replead pursuant to Fed. R. Civ. P. 15(a) in the event that the court ultimately determined that any of its claims was inadequately pled. BLS did not submit a proposed amended pleading at this time, however, since it believed that its complaint satisfied the requirements of Rule 8(a) and since it had no reason to believe that any of its claims was inadequately pled.

While the motion to dismiss was pending, LSNY notified BLS that it intended to terminate BLS's funding effective December 31, 2002. BLS immediately moved for a preliminary injunction to prevent LSNY from doing so. The basis for this motion was that if LSNY began withholding funds from BLS it would breach fiduciary duties that it owed to BLS and cause irreparable harm to BLS and the indigent Bronx residents represented by BLS. BLS submitted a lengthy affidavit from its Project Director and extensive documentary evidence in support of the preliminary injunction motion that both amplified and substantiated the factual allegations made in the complaint.

On January 17, 2003, the district court granted defendants' motions to dismiss on the ground that none of the claims alleged in the complaint was legally sufficient. The district court repeatedly noted in its memorandum decision (App. B) that the reason it was granting the motion was because the complaint failed to allege sufficient *facts* to establish a claim. Thus, the First claim (alleging violation of the LSC Act) was dismissed because "plaintiff *does not allege*" that LSC was "utilizing some other means to prevent

county-wide legal services organizations, like BLS, from independently applying directly and competing for LSC funds." App. B at 7a (emphasis added). The Second, Third and Fourth claims (alleging violation of Sections 1 and 2 of the Sherman Act and a state law antitrust claim) were dismissed because "plaintiff . . . does not allege *any facts* that could support its anti-trust claims." *Id.* at 11a (emphasis added). The Fifth claim (alleging first amendment retaliation) was dismissed because "there is no set of facts ***alleged in the Complaint*** which could support plaintiff's claim that LSC 'coerced' LSNY into adopting its reorganization plan in order to retaliate against BLS for filing the May 2000 lawsuit" (*Id.* at 14a) (emphasis added) and because "[p]laintiff simply has not alleged any set of facts ***in the Complaint*** which could reasonably lead to a causal connection between plaintiff's filing of the May 2000 lawsuit and LSNY's decision to institute the reorganization plan." *Id.* at 17a (emphasis added). The Seventh claim (alleging breach of fiduciary duty) was dismissed because "[t]he Complaint *fails to allege any facts* that would establish a joint venture between BLS and LSNY" (*Id.* at 19a) (emphasis added) and because "plaintiff *has not alleged* any extraordinary circumstances to overcome the language in the contract" with LSNY. *Id.* at 20a (emphasis added). Finally, the Eighth claim (alleging contract interference) was dismissed because "plaintiff *has failed to allege* that LSNY interfered with *a specific contract* it had with a third party." *Id.* at 21a (emphasis added). Despite the court's conclusions that the complaint failed to allege sufficient facts to state a claim, the court denied, in a footnote and with no explanation whatsoever, BLS's request for leave to replead in the event that any of its claims was found by the court to be deficient. *Id.* at 21a n.11.[3]

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3. As noted, the district court offered no explanation for denying leave to amend. Obviously, however, such denial could not have been justified on grounds of prejudice, bad faith, or undue delay, since the complaint had only recently been filed, one of the defendants (Cont'd)

The district court also summarily denied BLS's motion for a preliminary injunction on the ground that its ruling on the motion to dismiss "disposes of all claims in favor of defendants." App. B at 22a n.11. There was no indication that the district court, in determining whether the motion to dismiss should be granted, ever considered any of the substantial evidence that BLS had submitted in support of its preliminary injunction motion.

On appeal to the Second Circuit Court of Appeals, BLS argued that it was improper for the district court to have denied leave to amend without providing any explanation since, as this Court ruled in *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), "outright refusal to grant the leave without any

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(Cont'd)
had not yet answered, and no discovery of any kind had occurred. Moreover, there was no basis for concluding that amendment of the complaint would be futile as a matter of law. The court dismissed the LSC Act claim, for example, because it concluded that "plaintiff does not allege [that LSC was] utilizing some other means to prevent county-wide legal services organizations, like BLS, from independently applying directly and competing for LSC funds." App. B at 7a. In fact, however, evidence had already been submitted in connection with the preliminary injunction motion which showed that county-wide legal services organizations like BLS could *not* apply directly for LSC funds since LSC had designated New York City as a whole as the applicable service area. Obviously, therefore, BLS could easily have amended the complaint to cure this perceived pleading deficiency. Similarly, the sole basis for dismissing the contract interference claim was the court's belief that "plaintiff failed to allege that LSNY interfered with a specific contract it had with a third party." *Id.* at 21a. This purported deficiency could also have been easily remedied by amending the complaint. Likewise, in dismissing the fiduciary duty claim, the court concluded that "plaintiff has not alleged any extraordinary circumstances to overcome the language in the contract" with LSNY. *Id.* at 20a. Here again, BLS could certainly have pleaded additional facts if leave to replead had not been summarily denied, and indeed such additional facts had already been submitted in connection with the preliminary injunction motion.

justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of . . . discretion and inconsistent with the spirit of the Federal Rules." The Court of Appeals acknowledged that the district court had failed to give any explanation for its refusal to grant leave to amend (App. A at 2a), but nevertheless it affirmed the district court's decision on the ground that BLS had failed to present a proposed amended complaint when it requested leave to amend.

With respect to BLS's claim that defendants had violated federal and state antitrust laws, the district court concluded that these claims must be dismissed because LSC-funded legal services do not constitute "trade or commerce" within the meaning of the antitrust laws. App. B at 11a. The Court of Appeals summarily affirmed the decision of the district court on this issue "for the reasons stated in the District Court's opinion." App. A at 2a.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Courts Below Denying Leave To Amend Is Contrary To The Language And Purpose Of The Federal Rules Of Civil Procedure, Inconsistent With This Court's Decisions In *Conley* And *Foman*, In Conflict With The Rule Applied In Other Circuits, And Presents An Intolerable Procedural Dilemma For Attorneys Who Practice In Federal Courts

One of the main reasons the Federal Rules of Civil Procedure were adopted by this Court in 1937 was to eliminate the procedural pitfalls that frequently trapped litigants under the prior system of fact pleading and thereby prevented claims from being decided on the merits. As explained in *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957), "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the

principle that the purpose of pleading is to facilitate a proper decision on the merits." *See also Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506, 514 (2002) ("[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"); *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) ("[t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim").

Accordingly, the Federal Rules merely require that a "pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a). In applying this standard, this Court has frequently emphasized that legal disputes should be decided on the *merits* of the claims and not on the basis of compliance with technical pleading rules. *See, e.g., Swierkiewicz*, 534 U.S. at 514; *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Conley*, 355 U.S. at 48. Moreover, Rule 15(a) explicitly provides that "[l]eave [to amend] shall be freely given when justice so requires" and this Court has ruled that "this mandate is to be heeded." *Foman*, 371 U.S. at 182. For these reasons, a dismissal under Rule 12(b)(6) is proper "only if it is clear that no relief could be granted *under any set of facts* that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984) (emphasis added). Finally, in considering a request for leave to replead, it is settled law that "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of . . . discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182.

Despite the apparent clarity of Rules 8(a) and 15(a) and this Court's decisions in *Conley*, *Foman*, *Hishon*, *Leatherman* and *Swierkiewicz*, the question of what, if anything, a litigant

must do to protect its right to replead when confronted with a Rule 12(b)(6) motion to dismiss has generated significant uncertainty and procedural unfairness which needs to be addressed by this Court. Some circuits have ruled that litigants have an automatic right to replead following a Rule 12(b)(6) dismissal. *See Doe* v. *United States*, 58 F.3d 494 (9th Cir. 1995); *Schreiber Distributing Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) ("it is of no consequence that no request to amend the pleading was made in the district court"); *District Council 47* v. *Bradley*, 795 F.2d 310, 316 (3d Cir. 1986) ("we have never required plaintiffs to request leave to amend following a district court's dismissal of a complaint")[4]; *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir. 1984) ("[w]hen the original complaint alone is dismissed, the litigation has not been terminated and the plaintiff still retains his right to amend once as a matter of course under Rule 15(a)"); *Bank* v. *Pitt*, 928 F.2d 1108, 1112-13 (11th Cir. 1991), *overr'd by*, *Wagner* v. *Daewoo Heavy Industry America Corp.*, 314 F.3d 541 (11th Cir. 2002) ("[w]here a more carefully drafted complaint might state a claim, a plaintiff *must* be given at least one chance to amend the complaint before the district court dismisses the action with prejudice" even if "it is true that the [plaintiff] never requested leave to amend in the district court . . .") (emphasis added). Other circuits, in contrast, have ruled that litigants must request leave to amend *prior* to dismissal or the right to request leave to amend is waived. *See, e.g., Swan* v. *Board of Higher Education*, 319 F.2d 56, 60-61 (2d Cir. 1963); *Cinel* v. *Connick*, 15 F.3d 1338, 1346 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994); *Sinay* v. *Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991);

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4. *But see Ramsgate Court Townhome Ass'n* v. *West Chester Borough*, 313 F.3d 157 (3d Cir. 2002) (affirming a district court's denial of a request to amend following a Rule 12(b)(6) motion to dismiss on the ground that the plaintiff never filed a motion to amend or provided the district court with a proposed amended complaint).

Glenn v. *First Nat. Bank*, 868 F.2d 368, 371 (10th Cir. 1989); *Government of Guam* v. *American President Lines*, 28 F.3d 142, 150-51 (D.C. Cir. 1994); *cf. Acevedo-Villalobos* v. *Hernandez*, 22 F.3d 384, 387-88 (1st Cir. 1994). *See generally*, 3 *Moore's Federal Practice*, § 15.14[2] (Matthew Bender 3d ed. 2003) (recognizing conflict among the circuits).

Moreover, in circuits in which leave to amend must be explicitly requested, it is uncertain what must be done to preserve the right to replead. Most courts routinely grant plaintiffs the right to amend the complaint following a Rule 12(b)(6) dismissal unless it is clear that such an amendment would be futile, or unless one or more of the other factors enumerated by this Court in *Foman* as a basis for denying leave to amend is present. *See, e.g.*, *Ricciuti* v. *N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991) ("[a]s a matter of procedure, when a complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, that request should ordinarily be granted"). In some instances, however, as demonstrated by the decision at issue here, courts have denied leave to amend *without any justifying reason* simply because the plaintiff did not submit a proposed amended pleading at the time it requested leave to amend. *See, e.g.*, *Ramsgate Court Townhouse Ass'n*, 313 F.3d at 161 (although plaintiff requested leave to amend in its brief in opposition to a motion to dismiss, it "never filed a motion to amend, nor did it provide the district court with a proposed amended complaint" and thus, "[a]s a consequence, the court had nothing upon which to exercise its discretion"); *Roskam Baking Co.* v. *Lanham Machinery Co.*, 288 F.3d 895, 906-07 (6th Cir. 2002) ("the district court must be able to determine whether 'justice so requires,' and in order to do this, the court must have before it the substance of the proposed amendment"); *Glenn* v. *First Nat. Bank*, 868 F.2d at 371 ("[a] naked request for leave to amend asked for as

alternative relief when a party has the unexercised right to amend is not sufficient").

The uncertainty, capriciousness and inherent unfairness of this procedure is cogently illustrated by what happened to petitioner here. Shortly after BLS served its complaint alleging eight separate claims for relief based upon various legal theories, LSC and LSNY moved to dismiss each and every claim under Rule 12(b)(6) on the ground that they failed to state a cause of action. When this motion was made, no pretrial discovery had occurred, no Rule 16(b) scheduling order had been entered, and LSC had not yet answered the complaint. Moreover, BLS had not previously amended the complaint, either as of right or by leave of the court. As might be expected, the briefs in support of and in opposition to the motion addressed numerous legal and factual arguments as to why the various claims alleged in the complaint were or were not legally sufficient. In opposing the motion to dismiss, BLS had no particular reason to believe that the factual allegations set forth in the complaint failed to satisfy the "notice pleading" requirements of Rule 8(a). Accordingly, it did not file an amended complaint under Rule 15(a) as it had a right to do. However, it did ask for leave to amend in the event that the district court ultimately concluded that any of the claims alleged in the complaint was inadequately pleaded. This was done to insure that BLS did not waive its right to replead by failing to ask for leave to amend prior to the court's ruling on the motion to dismiss. *See*, *e.g.*, *Elfenbein* v. *Gulf & Western Industries*, *Inc.*, 590 F.2d 445, 448 n.1 (2d Cir. 1978); *Swan* v. *Board of Higher Education*, 319 F.2d 56, 60-61 (2d Cir. 1963).

While the motion to dismiss was still pending, LSNY informed BLS that it intended to cut off BLS's funding at the end of the year. BLS immediately moved for a preliminary injunction to prevent this from occurring and, in support of the motion, submitted substantial evidence which showed

that BLS was likely to succeed on the merits of its claims, particularly the breach of fiduciary duty claim.

On January 19, 2003, the district court issued a decision which granted defendants' Rule 12(b)(6) motion to dismiss the complaint in its entirety. In a footnote and without any discussion, the court denied BLS's motion for a preliminary injunction on the ground it was moot because the complaint had been dismissed. *See* App. B at 22a n.11. Finally, in the same footnote and without specifying any reason for its decision, the district court also denied BLS's request for leave to amend the complaint in the event that the motion to dismiss was granted. *Id.*

As noted above, the district court repeatedly noted in its memorandum decision (App. B) that the reason it was granting the motion to dismiss was because the complaint failed to allege sufficient *facts* to establish the claims alleged. BLS could easily have amended the complaint to cure all of the deficiencies identified by the district court. Indeed, most of these purported deficiencies had already been cured by the evidence that BLS submitted in support of the preliminary injunction motion. Yet, BLS was precluded from filing an amended complaint because the district court had explicitly denied its request for leave to do so. As a result, BLS was completely deprived of the opportunity to prove its claims on the merits — judgment was entered dismissing BLS's claims based solely on perceived pleading deficiencies.

On appeal, BLS argued that the district court's outright refusal to grant leave to amend without specifying any ground for its decision was grossly improper under Fed. R. Civ. P. 15(a) and this Court's holding in *Foman*. The Court of Appeals recognized that the district court had failed to provide any explanation for denying leave to amend, yet it summarily affirmed the court's decision on the ground that

BLS had failed to present a proposed amended complaint when it requested leave to amend. *See* App. A at 2a.

This decision by the Second Circuit is contrary to the language and purpose of the Federal Rules, inconsistent with this Court's decisions in *Conley* and *Foman*, in conflict with the decision of other circuits, and it presents an intolerable procedural dilemma for attorneys practicing in federal court. Accordingly, petitioner respectfully requests that the rule applied by the Second Circuit should be reviewed and reversed by this Court.

A. The Decision Of The Court Below Is Contrary To The Language And Purpose Of The Federal Rules Of Civil Procedure And Is Inconsistent With This Court's Decisions In *Conley* And *Foman*

Pleading a claim under the Federal Rules of Civil Procedure merely requires "a short and plain statement of the claim" (*see* Rule 8(a)), not a detailed statement of facts. *See Leatherman*, 507 U.S. at 168; *Conley*, 355 U.S. at 47. As this Court recently noted in *Swierkiewicz*, "[s]uch a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" 534 U.S. at 512 (quoting from *Conley*, 355 U.S. at 47). Moreover, Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be construed as to do substantial justice." Finally, Rule 15(a) explicitly provides for liberal amendment of pleadings, both as a matter of right (once before a responsive pleading is served) and with leave of the court (for a second amendment or after a responsive pleading has been served). The purpose of these provisions is to insure that legal disputes are decided on the merits, not on the basis of technical pleading rules. *See Swierkiewicz*, 534 U.S. at 514; *Foman*, 371 U.S. at 182; *Conley*, 355 U.S. at 48.

The rule that was applied by the Second Circuit here is directly contrary to the purpose and language of the Federal Rules and to the reasoning of *Conley*, *Foman* and *Swierkiewicz*. BLS has never had an opportunity to prove its claims on the merits because they were summarily dismissed for technical pleading deficiencies. Furthermore, in denying leave to replead the district court gave no explanation whatsoever for its decision.

The Second Circuit justified the district court's decision denying leave to replead on the ground that BLS had failed to submit a proposed amended complaint at the time it requested leave to replead. This explanation, however, is both logically invalid and legally unsupportable, and it conflicts with the policy of the Federal Rules that disputes should be decided on the merits not on the basis of inflexible pleading rules. This is so for several reasons.

First, until the district court issued its decision, BLS had no reason to believe that the factual allegations of its complaint were deficient and, therefore, it had no way of drafting a proposed amended pleading that would cure unknown deficiencies. It was only after the district court had issued its decision and identified what it viewed as deficiencies that BLS was in a position to draft an amended complaint. By this time, however, BLS was already precluded from amending the complaint because the district court had denied leave to amend.

Second, there is no requirement in Rule 15(a) that a proposed amended pleading be submitted to the court as a condition of seeking leave to amend. On the contrary, Rule 15(a) merely provides as follows:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a

> party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Since there is no explicit requirement in Rule 15(a) for a litigant to submit a proposed amended pleading as a condition for obtaining leave to amend, it was improper for the Second Circuit to engraft such a requirement onto the Rule.[5] This is particularly true where, as here, the litigant has not previously amended the complaint and has no particular amendment in mind but merely seeks to notify the district court that it desires the opportunity to replead in the event a Rule 12(b)(6) motion to dismiss is granted.

Finally, the Second Circuit justified the district court's denial of leave to amend as an exercise of discretion based upon the fact that BLS had failed to submit a proposed amended pleading. In fact, however, no discretion was ever exercised by the district court. It summarily denied leave to replead without providing any explanation whatsoever. As this court ruled in *Foman*, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of . . . discretion and inconsistent with the spirit of the Federal Rules." 371 U.S. at 182.

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5. There is also nothing in the Local Rules of the Southern District of New York which requires that a proposed amended pleading be submitted to the court as a condition for requesting leave to replead under Rule 15(a).

B. The Decision Of The Court Below Is Contrary To The Rule Of Other Circuits Which Do Not Require That A Proposed Amended Pleading Be Submitted To Obtain Leave To Amend Following A Motion To Dismiss

The rule applied by the Second Circuit here is contrary to the rule applied in other circuits. The Ninth Circuit, for example, has explicitly ruled that where a complaint is dismissed pursuant to Rule 12(b)(6) for failure to state a claim, a district court *must* grant leave to amend ***even if no request to amend the pleading is made.*** *See Doe* v. *United States*, 58 F.3d at 497; *Schreiber Distributing Co.*, 806 F.2d at 1401 ("it is of no consequence that no request to amend the pleading was made in the district court"). Thus, where, as here, a party requests leave to amend but fails to submit a proposed amended pleading at the time of the request, the request for leave must be granted.

The Third and Seventh Circuits also appear to follow the rule that litigants have an absolute right to amend the complaint following a Rule 12(b)(6) dismissal without requesting leave of the court. *See District Council 47*, 795 F.2d at 316 ("we have never required plaintiffs to request leave to amend following a district court's dismissal of a complaint")[6]; *Car Carriers, Inc.*, 745 F.2d at 1111 ("[w]hen the original complaint alone is dismissed, the litigation has not been terminated and the plaintiff still retains his right to amend once as a matter of course under Rule 15(a)").

Until recently, the Eleventh Circuit also followed the Ninth Circuit rule that leave to amend should be granted

6. *But see Ramsgate Court Townhome Ass'n*, 313 F.3d at 157 (affirming a district court's denial of a request to amend following a Rule 12(b)(6) motion to dismiss on the ground that the plaintiff never filed a motion to amend or provided the district court with a proposed amended complaint).

whenever a complaint is dismissed for failure to state a claim pursuant to Rule 12(b)(6) even if the plaintiff does not request leave to amend. *See Bank* v. *Pitt*, 928 F.2d 1108 (11th Cir. 1991). However, the Eleventh Circuit recently overruled *Pitt* in *Wagner* v. *Daewoo Heavy Industries America Corp.*, 314 F.3d 541 (11th Cir. 2002), to require that a plaintiff must at least request leave to replead in the district court prior to appealing to the Court of Appeals. The reason for this new rule is to avoid what amounts, in effect, to appeals from non-final judgments. As the Eleventh Circuit explained in *Wagner*:

> Under the *Bank* rule, a plaintiff could sit idly by as he awaited the district court's determination with respect to a Rule 12(b)(6) motion to dismiss; he need not seek leave to amend his complaint nor amend it as of right because he would have "two bites at the apple" on appeal. As in this case, the plaintiff could appeal the adverse ruling of the district court as long as it was a final judgment. If we reversed the district court, the plaintiff's appeal was successful. His appeal, however, also was successful if we affirmed the district court, because we would then remand the case to the district court and instruct the court to permit the plaintiff to amend his complaint. Consequently, the plaintiff reaped several benefits without taking any risks by appealing the dismissal without seeking leave to amend before the district court.

314 F.3d at 543.

The new rule established by the Eleventh Circuit is that a "[a] district court is not ***required*** to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend *nor requested leave to amend before the district court*." 314 F.3d at 542 (emphasis added). Where, however, a plaintiff *does* request

leave to amend before the district court in response to a Rule 12(b)(6) motion to dismiss, then the district court is required to grant it. Even under this revised formulation, therefore, the rule established in the Eleventh Circuit is completely contrary to the rule applied by the Second Circuit in the case at issue here. BLS clearly and unquestionably requested leave to amend in the district court and thus would be entitled to amend as a matter of right in the Eleventh Circuit.

In adopting its new rule in *Wagner*, the Eleventh Circuit recognized that there was a "split" of authority among the circuits regarding whether a litigant must request leave to replead in the district court in order to file an amended complaint following a Rule 12(b)(6) dismissal. *See* 314 F.2d at 543-44. The court described the new rule that it adopted (*i.e.*, requiring that a plaintiff at least request leave in the district court prior to appealing to the Court of Appeals) as being "in line with the majority of our sister circuits." *Id.* at 544 (citing cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits). However, the court also recognized that the Ninth and Third Circuits were contrary (citing *Doe* v. *United States*, *supra*, and *District Council 47*, *supra*).

Circuit courts have also split on the issue of how a dismissal pursuant to Rule 12(b)(6) affects a party's right to amend a pleading "as of right" under Rule 15(a) prior to service of a responsive pleading. Almost all courts agree that a Rule 12(b)(6) motion is not a "responsive pleading" within the meaning of Rule 15(a). *See*, *e.g.*, *Whitaker* v. *City of Houston*, 963 F.2d 831, 834-35 (5th Cir. 1992) ("[t]his court follows the prevailing view that a motion to dismiss is not a responsive pleading"); *Mayes* v. *Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984). Since a Rule 12(b)(6) dismissal is not a final judgment, some circuits have ruled that such a dismissal does not terminate a party's ability to amend under Rule 15(a) as of right. *See*, *e.g.*, *Camp* v. *Gregory*, 67 F.3d 1286, 1289 (7th

Cir. 1995), *cert. denied*, 517 U.S. 1244 (1996) (". . . an order dismissing the original complaint normally does not eliminate the plaintiff's right to amend once as a matter of right"); *Mayes*, 729 F.2d at 607 ("[n]either the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper . . .") (quoting from *Breier* v. *Northern California Bowling Proprietors Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963). Other courts, however, have ruled that once a court grants a Rule 12(b)(6) motion to dismiss, a litigant's ability to amend the pleading as of right under Rule 15(a) ceases and such an amendment can only be obtained with leave of the court. *See, e.g.*, *Dorn* v. *State Bank of Stella*, 767 F.2d 442, 443 (8th Cir. 1985) ("[a]fter a complaint is dismissed, the right to amend under Fed. R. Civ. P. 15(a) terminates"); *Elfenbein*, 590 F.2d at 445.

Finally, there is also a split among the circuits (and even within circuits) regarding the issue of whether a district court may deny leave to amend where, as here, a litigant requests leave to amend in the event a Rule 12(b)(6) motion to dismiss is granted but fails to provide the district court with a copy of the proposed amendment. Like the court below,[7] the Third and Tenth Circuits have ruled that a district court may summarily deny leave to amend in such a situation. *See Ramsgate Court Townhome Association*, 313 F.3d at 157; *Lake* v. *Arnold*, 232 F.3d 360, 374 (3d Cir. 2000); *Calderon* v. *Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999).[8] As noted above, however, this is directly

7. *But see McLaughlin* v. *Anderson*, 962 F.2d 187, 195 (2d Cir. 1992) ("the lack of a formal motion is not sufficient ground for a district court's dismissal without leave to amend, so long as the plaintiff has made its willingness to amend clear").

8. *But see Ramirez* v. *Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 n.9 (10th Cir. 1994) ("Defendants had yet to answer (Cont'd)

contrary to the rule in the Ninth Circuit, which does not even require that the plaintiff request leave to amend. It is also inconsistent with the rule in the Fifth Circuit, which does not require that a proposed amended pleading be submitted. *See, e.g., Davis* v. *United States*, 961 F.2d 53, 57 (5th Cir. 1991); *Zaidi* v. *Ehrlich*, 732 F.2d 1218 (5th Cir. 1984).[9] It would also appear to be inconsistent with the rule adopted by the Eleventh Circuit in *Wagner*, which makes no mention of any requirement of submitting a proposed amended pleading in order to obtain leave to amend. Professor Moore has commented on the inconsistency of these decisions, stating "failure to attach the proposed amendment is not necessarily fatal, but may result in denial of leave to amend on the ground that the court cannot evaluate the propriety of granting leave unless the court is presented with the substance of the proposed amendment." 3 *Moore's Federal Practice*, § 15.17[1] (Matthew Bender 3d ed. 2003).

In short, the decisions of the circuit courts are hopelessly in conflict — there is simply no clear or consistent rule regarding the proper procedure to be followed for obtaining leave to amend a complaint in response to a Rule 12(b)(6) motion to dismiss for failure to state a claim. Accordingly, this Court should grant certiorari to resolve the foregoing conflicts among the circuits and to provide guidance to litigants regarding this important procedural issue.

(Cont'd)
the complaint against them; therefore, plaintiffs were entitled to amend the complaint as a matter of course, notwithstanding the absence of a formal motion and proposed amended complaint filed by plaintiffs").

9. *But see Cinel* v. *Connick*, 15 F.3d at 1346 (denying leave to amend where appellant "failed to indicate specifically how he would amend his complaint to overcome the 12(b)(6) dismissal").

C. The Rule Applied By The Court Below Presents An Intolerable Procedural Dilemma For Attorneys Practicing In Federal Court

Finally, the rule applied by the Second Circuit here presents an intolerable procedural dilemma for attorneys practicing in federal court. In the majority of circuits, leave to replead must be requested *prior* to the time a district court rules on a Rule 12(b)(6) motion to dismiss or it is waived. *See, e.g.*, *Glenn* v. *First Nat. Bank*, 868 F.2d at 370; *Dorn* v. *State Bank of Stella*, 767 F.2d at 443; *Swan* v. *Board of Higher Education*, 319 F.2d at 60-61; *but see*, *Doe* v. *United States*, 58 F.3d at 496-97; *Wagner* v. *Daewoo Heavy Industries America Corp.*, 314 F.3d at 542-43; *Camp* v. *Gregory*, 67 F.3d at 1289-90. Presumably, competent attorneys always attempt to draft their complaints with a view towards satisfying the notice pleading requirements of Fed. R. Civ. P. 8(a) in the first instance and thereby avoiding dismissal under Rule 12(b)(6). Ordinarily, therefore, there is no reason for such an attorney to submit a proposed amended complaint in response to a Rule 12(b)(6) motion to dismiss, since he or she will have no reason to believe that the original complaint is deficient. As a practical matter, therefore, it is only *after* the district court has ruled on the motion to dismiss and identified particular pleading deficiencies that the plaintiff's attorney will be in a position to draft an amended complaint that addresses the deficiencies found by the court. Yet, under the rule applied by the Second Circuit here, it is then too late to amend, since the proposed amendment was not submitted to the district court prior to the time the court ruled on the motion to dismiss. Such a "Catch-22" dilemma is inherently unfair and illogical, and it has no place under the liberal pleading provisions of the Federal Rules which were intended to insure that disputes be decided on the merits, not on the basis of stringent pleading rules.

II. The Fact That Legal Services Are Funded By Grants From The Federal Government And Provided At No Cost To Eligible Low Income Clients Does Not Mean That Such Services Are Exempt From The Federal Antitrust Laws

The Second, Third, and Fourth claims of BLS's complaint alleged that LSC and LSNY violated Section 1 of the Sherman Act, Section 2 of the Sherman Act, and Section 340 of the NY General Business Law, respectively. The courts below dismissed these claims on two grounds: first, that the activities at issue were "purely non-commercial" and thus did not involve "trade or commerce" within the meaning of the antitrust laws (*see* App. B at 11a) and, second, that the complaint did not allege antitrust injury (*Id.* at 12a). Both of these conclusions were erroneous.

A. The Activity At Issue Here Is "Commercial"

Several salient points can be briefly noted. ***First***, case law is clear that Congress intended the Sherman Act to embrace the widest array of conduct possible. *See, e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-88 (1975). ***Second***, case law is also clear that the antitrust laws apply to non-profit corporations. *See, e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 101 n.22 (1984) ("[t]here is no doubt that the sweeping language of § 1 applies to nonprofit entities"); *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) ("[i]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws"). ***Third***, "courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of the surrounding circumstances." *See, e.g.*, *United States* v. *Brown University*, 5 F.3d 658, 666 (3d Cir. 1993). ***Fourth***, "the exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction." *Id.* at 666. ***Fifth***, the

provision of legal services is unquestionably a commercial transaction within the meaning of the antitrust laws. *Goldfarb*, 421 U.S. at 786-88 ("[i]t is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect"); *FTC* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (holding that a group of trial lawyers' concerted refusal to accept further assignments to defend indigent criminal defendants until they received an increase in compensation for such representation was an illegal *per se* group boycott in violation of Section 1 of the Sherman Act).

In the present case, the district court recognized that "non-profit organizations are not per se entitled to exemption from the Sherman Act" (App. B at 10a) and that "a court will examine the nature of the conduct of the non-profit organization and ***the totality of the circumstances*** in determining if a transaction is business or commercial, and thus subject to Sherman Act liability." *Id.* at 11a (emphasis added) (citing *Brown*, 5 F.3d at 666). The court also recognized that "the exchange of money for services is the hallmark of a commercial transaction." App. B at 11a (citing *Id.*). The district court concluded, however, based solely on the pleadings, that "there is no exchange of money for services here," but merely "a series of charitable gifts." App. B at 11a. As the court explained:

> Defendants' actions, as alleged, are purely non-commercial. ***There is no exchange of money for services here***, or anything akin to a business or commercial transaction. Although LSC provides federal funds to LSNY, ***LSC does not receive anything in return from LSNY***. Likewise, when LSNY passes those funds down to BLS, ***LSNY does not receive anything in return from plaintiff*** for the money. Rather, BLS uses the money to provide free legal services to the indigent

> population in the Bronx. Rather than a business or commercial exchange, ***this situation is more akin to a series of charitable gifts from one party to another***. App. B at 11a-12a (emphasis added).

There were three fundamental flaws in this analysis. *First*, it was legally and logically invalid to characterize the relationship among LSC, LSNY and BLS as "a series of charitable gifts." The notion that LSC "does not receive anything in return from LSNY" for the funds that it distributes pursuant to the LSC Act, or that LSNY "does not receive anything in return" from BLS distorts the economic reality of these transactions. LSC *contracted* with LSNY to provide free legal services to indigent residents in New York City *in exchange for* the receipt of federal funds; LSNY, in turn, *subcontracted* with BLS to provide such services to indigent residents of the Bronx *in exchange for* a portion of the funds received from LSC. Moreover, LSNY and BLS are both subject to oversight and audit by LSC and others *to insure that they comply with* the terms of their contracts, the LSC Act and the rules and regulations adopted by LSC. Clearly, LSC received something of value in exchange for providing funds to LSNY and LSNY, in turn, received something of value in return for providing funds to BLS. Accordingly, these transfers cannot be characterized as "charitable gifts" in any meaningful sense.

Second, even if LSC's "grant" to LSNY and LSNY's "subgrant" to BLS can properly be characterized as "gifts," that does not signify they are beyond the purview of the antitrust laws. Scholarships awarded to students by colleges are clearly charitable gifts. Yet, in *United States* v. *Brown University*, *supra*, the Third Circuit ruled that an allegation that colleges had agreed among themselves regarding the amount of financial aid each would offer to particular students was sufficient to state a violation of the antitrust laws. Similarly here, BLS's allegation that LSC and LSNY colluded

regarding the terms and conditions for awarding LSC grants violates Section 1 of the Sherman Act. Moreover, in *Hamilton Chapter of Alpha Delta Phi, Inc.* v. *Hamilton College*, 128 F.3d 59 (2d Cir. 1997), the Second Circuit ruled that Hamilton College's policy of requiring students to live in on-campus housing and subscribe to a meal plan was sufficient to state a claim for monopolization in violation of the Sherman Act, notwithstanding the fact that defendant was a non-profit institution engaged in the non-commercial activity of providing higher education. Similarly here, BLS's allegation that LSNY was attempting to monopolize (and that LSNY and LSC were conspiring to monopolize) the market for LSC-funded legal services in New York City was sufficient to state a claim under Section 2 of the Sherman Act, notwithstanding the fact that LSC and LSNY are both non-profit corporations engaged in providing subsidized legal services to indigent persons.

Third, as the district court recognized, the question of whether particular conduct constitutes a "commercial activity" for purposes of the antitrust laws must be evaluated based upon the "*totality of the circumstances*." App B at 11a (citing *Brown University*, 5 F.3d at 666). In light of this standard, it was clearly inappropriate for the court below to make what amounted to a factual determination that the conduct at issue here was "non-commercial" based solely on the pleadings, especially since the court refused to allow BLS an opportunity to amend its complaint to cure any perceived deficiencies. As noted above, under the "notice pleading" standard of the Federal Rules of Civil Procedure, the function of the complaint is merely to allege "a short and plain statement of the claim" (Fed. R. Civ. P. 8(a)), not to delineate the "totality of the circumstances" of the claim. As this Court made clear in *Conley*:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts

> upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. 355 U.S. at 47.

Accordingly, it was wholly inappropriate for the courts below to rule, based solely on the pleadings, that LSC-funded legal services do not constitute "trade or commerce" within the meaning of the antitrust laws.

B. The Complaint Alleged "Antitrust Injury"

The courts below also appear to have ruled that BLS's antitrust claims were deficient because they failed to allege "antitrust injury." As the district court stated:

> Further, plaintiff has not alleged, and could not possibly allege, that anything about the relationship between the parties or the reorganization plan will cause ***any of the harms the Sherman Act was intended to prevent***, such as restriction of the product (here, legal services), a raise in prices, or other controls on the market that are to the detriment of the consumer (here, the indigent Bronx population). There has been no allegation that if BLS becomes a wholly-owned subsidiary of LSNY, it will adversely affect the availability of attorneys or that the legal services will no longer remain free to the indigent.

App. B at 12a (emphasis added).

To the extent that the decision of the courts below was based upon a perceived lack of antitrust injury, it was clearly erroneous. The Second Count of the complaint alleged that LSC and LSNY conspired and agreed, by unlawful means,

to force seven independent legal service providers in New York City to consolidate into one organization under the control of LSNY in violation of Section 1 of the Sherman Act, and the Third Count alleged that LSNY, acting in collusion with LSC, attempted and conspired to monopolize the market for LSC-funded legal services in New York City. These are clearly "antitrust" injuries within the meaning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) since they directly and adversely affect the scope and intensity of competition within the relevant market. Whereas previously there were eight separate and independent legal service providers in New York City capable of competing against one another for LSC funds, that number was reduced to one as a direct and proximate result of defendants' unlawful conduct. Obviously, it is reasonable to infer from these allegations that defendants' conduct will harm competition, since all potential competitors have been eliminated.

The district court's assertion that defendants' conduct will not result in "restriction of the product (here, legal services), a raise in prices, or other controls on the market that are to the detriment of the consumer (here the indigent Bronx population) . . . [or] adversely affect the availability of attorneys or that the legal services will no longer remain free to the indigent" (App. B at 12a) is both factually and legally unfounded and logically invalid. Obviously, the *price* of legal services paid by indigent residents will not be affected, since they are not paying anything to begin with. But that does not signify that the *cost* of providing such services will not increase due to the absence of competition. Since the United States is paying this cost (through the grant subsidy program), it will pay the increased "price." Furthermore, to the extent that lack of competition results in inefficiencies, this may also cause a "restriction of the product (here, legal services)" as well as "adversely affect the availability of attorneys." *See* App. B at 12a. In short, there was no legal, factual or economic basis for the conclusion of

the courts below that the acts BLS complained of will not cause "any of the harms the Sherman Act was intended to prevent." *See* App. B at 12a. And certainly there was no justification for making such a determination based solely on the pleadings. For the reasons explained in Point I, *supra*, petitioner should have been afforded the opportunity to offer proof on this issue.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted. The decision of the courts below denying leave to amend constitutes a gross departure from the language and policy of Rules 8(a) and 15(a) of the Federal Rules of Civil Procedure and prior decisions of this Court, and it raises significant issues that have far reaching national interest and should be addressed by this Court. The need for such review is especially acute in view of the fact that there is an actual conflict among the circuits on this issue.

Similarly, the decision of the courts below that LSC-funded legal services do not constitute "trade or commerce" within the meaning of the federal antitrust laws is an important question of statutory interpretation that should be addressed by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 29, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of October Two thousand three.

PRESENT:

RALPH K. WINTER
JOSÉ A. CABRANES
ROBERT D. SACK

No. 03-7102

BRONX LEGAL SERVICES,

Plaintiff-Appellant,

-v.-

LEGAL SERVICES FOR NEW YORK CITY and
LEGAL SERVICES CORPORATION,

Defendants-Appellees.

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (George B. Daniels, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby **AFFIRMED**.

SUMMARY ORDER

Plaintiff Bronx Legal Services appeals from an Opinion and Order of the District Court that (i) granted defendants' motion to dismiss the complaint, (ii) denied plaintiff's motion for a preliminary injunction, and (iii) denied plaintiff's application for leave to amend.

Substantially for the reasons stated in the District Court's opinion, we affirm the judgment of the District Court dismissing the complaint and denying plaintiff's motion for a preliminary injunction.

We also affirm the District Court's denial of leave to amend the complaint. While it is true that the District Court did not elaborate on its decision to deny leave to amend, it is also true that plaintiff gave the Court no reason why it should be entitled to amend. Instead, without offering any proposed amendments, plaintiff simply requested, at the end of its brief in opposition to defendants' motions to dismiss, that it be given an opportunity to replead in the event the motions were granted. Even now, in their appellate briefs, plaintiff does not tell us exactly what it might allege in an amended complaint that would cure the deficiencies in its pleadings.

Appendix A

In the circumstances presented, we cannot conclude that the District Court abused its discretion when it summarily denied an unsubstantiated request for leave to amend.

We have considered all of plaintiff's claims on appeal and we hereby **AFFIRM** the judgment of the District Court.

FOR THE COURT,

Roseann B. MacKechnie, Clerk of Court
By s/ Lucille Carr

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 17, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 6199 (GBD)

BRONX LEGAL SERVICES,

Plaintiff,

v.

LEGAL SERVICES FOR NEW YORK CITY and LEGAL SERVICES CORPORATION

Defendants.

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, DISTRICT JUDGE:

Plaintiff Bronx Legal Services ("BLS") brought suit against defendants alleging violations of the Legal Services Corporation Act, federal and state anti-trust violations, retaliation in violation of the First Amendment, violations of the New York Judiciary Law, and state tort claims. Defendant Legal Services Corporation ("LSC") filed a motion to dismiss and defendant Legal Services for New York City

("LSNY") filed a motion for judgment on the pleadings. For the reasons stated below, defendants' motions are granted.[1]

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a Complaint where the Complaint "fail[s] . . . to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In reviewing a motion to dismiss, this Court accepts the allegations in the Complaint as true and draws all reasonable inferences in favor of the non-moving party. *See Patel v. Searles,* 305 F.3d 130, 134-35 (2d Cir. 2002). Here, a motion to dismiss will only be granted if the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *See Citibank, N.A. v. K-H Corp.,* 968 F.2d 1489, 1494 (2d Cir. 1992). A court may look at the Complaint and any documents attached to, or incorporated by reference in, the Complaint. *See Dangler v. New York City off Track Betting Corp.,* 193 F.3d 130, 138 (2d Cir.1999).

The Legal Services Act Claim

Plaintiff argues that the concerted actions of LSC and LSNY to "force" BLS to reorganize itself as a wholly-owned subsidiary of LSNY or else lose federal LSC funding violates the Legal Services Corporation Act ("LSC Act"). Plaintiff argues that the statute and regulations require that LSC award funds based on competitive bidding among legal service providers, and that the reorganization plan violates that mandate.

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1. This Court will treat LSNY's motion for judgment on the pleadings as a motion to dismiss as the same standard applies to both motions.*See Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir.1999).

Appendix B

LSC is a non-profit corporation established in 1974 by the LSC Act for the purpose of "providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC itself does not directly provide any legal services to clients. It provides grant money and contracts with various other legal services organizations. Those organizations either provide legal services, or in turn subcontract out to another organization. LSNY currently is the only legal services organization in New York City that receives grant money directly from LSC. LSNY, in turn, sub-contracts out to seven county-wide legal services organizations to provide legal services to indigent clients. Plaintiff is one of LSNY's sub-grantee organizations that directly service clients.[2] The regulations adopted by LSC require that legal services organizations seeking to obtain LSC funds go through a competitive bidding process, whereby qualified applicants submit applications to LSC for grants and contracts. *See* 45 C.F.R. § 1634.1.

In support of its argument that the reorganization plan violates the competitive bidding mandate, plaintiff argues that since 1998 the number of LSC-funded legal services organizations has decreased nationwide from 262 to 207. Plaintiff contends that that decrease is a direct result of LSC's nationwide initiative to reorganize and consolidate legal services organizations.

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2. The six other sub-grantee organizations are: Brooklyn Legal Services Corporation A, Brooklyn Legal Services Corporation B, Bedford-Stuyvesant Legal Services, Harlem Legal Services, MFY Legal Services, and Queens Legal Services. LSNY seeks to reorganize all seven of its sub-grantee organizations into wholly-owned subsidiaries.

However, even if this is true, this does not lead to the conclusion that the competitive bidding mandate has been violated. The regulations only indicate that a "competitive system" will be used to award grants and contracts to applicants. *See* 45 C.F.R. § 1634.1. Neither the LSC Act nor the regulations mandate a specific number of grants that must be awarded each year, and plaintiff does not contend that they do. Nor does plaintiff allege that LSC has refused to take applications, or is utilizing some other means to prevent county-wide legal services organizations, like BLS, from independently applying directly and competing for LSC funds. In fact, if plaintiff chooses to reject LSNY's reorganization plan, and LSNY does not renew its funding contract with BLS, plaintiff has alleged nothing in its Complaint that would lead to the conclusion that it could not apply directly on its own for LSC funding. Plaintiff simply has not alleged any facts sufficient to state a claim that defendants' actions have violated the competitive bidding requirement.

Plaintiff further argues that LSC's actions are arbitrary and capricious, and not authorized by the "Powers, duties, and limitations" section or by the "Grants and contracts" section of the Act.[3] The "Powers, duties, and limitations" section authorizes LSC to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to and contracts with" a variety of legal service providers. 42 U.S.C. § 2996e(1)(A). Pursuant to the "Grants and contracts" section, LSC is required to

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3. Plaintiff made this argument for the first time at oral argument. Nonetheless, this Court will address it.

"insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas[.]" 42 U.S.C. § 2996f(a)(3).

By the plain language of the "Powers, duties, and limitations" section, LSC is not required to give out money to every applicant, rather only those that are "qualified." Further, the "Grants and contracts" section mandates that LSC only give out money in a manner that is economical and that effectively delivers legal assistance. Therefore, the Act necessarily empowers LSC to make a determination, in light of the goals and mandates of the Act, as to what criteria constitutes a successful application, and turn down those applicants that do not meet that criteria. LSC has determined that if LSNY, a grantee legal services organization, wants to continue to receive LSC funds, it must better structure itself so as to more efficiently and effectively meet the needs of the indigent in New York City. In response, LSNY made the determination that city-wide consolidation of sub-grantee legal services organizations, like plaintiff, was the best method of achieving this goal. Although plaintiff may not agree with defendants' determination, it is not arbitrary or capricious. Plaintiff simply has not alleged any facts that, even if taken as true, would lead to the conclusion that defendants' actions violated the LSC Act. Therefore, defendants' motions to dismiss the LSC Act claim are granted.

Appendix B

The Anti-Trust Claims

Plaintiff argues that defendants' actions violate three anti-trust provisions. First, plaintiff argues that defendants actions constitute an unlawful conspiracy in restraint of trade, in violation of § 1 of the Sherman Act. Second, plaintiff argues that defendants violated § 2 of the Sherman Act by conspiring to monopolize the relevant market. Lastly, plaintiff argues that defendants conduct violates the Donnelly Act, New York's antitrust law.[4]

Section 1 of the Sherman Act makes unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of *trade or commerce* among the several States[.]" 15 U.S.C. § 1 (2002) (emphasis added). Section 2 of the Sherman Act provides that "any person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the *trade or commerce* among the several States . . . shall be deemed guilty of a felony[.]" 15 U.S.C. § 2 (2002) (emphasis added). In both sections of the statute, therefore, the unlawful activity must affect "trade or commerce."

Although the Sherman Act does not define what activity constitutes "trade or commerce," the Supreme Court has noted that the legislative history of the Act reveals that

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4. With the exception of the effect on interstate commerce, the Donnelly Act was patterned after the Sherman Act. Therefore, the Donnelly Act is generally interpreted consistently with the Sherman Act. *See Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 98 n.4 (2d Cir.1987); *Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 254 (S.D.N.Y.1995).

Appendix B

Congress identified restraints and barriers in *business competition* as the problem the statute was intended to address. *See Apex Hoisery Co. v. Leader,* 310 U.S. 469, 493 n.15 (1940) ("'Business competition' was the problem considered and . . . the act was designed to prevent restraints of trade which had a significant effect on such competition.") The Act was intended to prevent "restraints to free competition in business and commercial transactions" because those restraints tend "to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." *Hamilton Chapter of Alpha Delta Phi v. Hamilton College,* 128 F.3d 59, 63 (2d Cir. 1997), *quoting Apex Hosiery,* 310 U.S. at 493. "Trade or commerce," as used in the Act, therefore, necessarily relates to the business of the exchange of goods in the marketplace. *See e.g., Dedication and Everlasting Love to Animals v. Humane Soc'y of the United States, Inc.,* 50 F.3d 710, 712 (9th Cir. 1995) (hereinafter *"D.E.L.T.A."*) (noting that the Supreme Court has spoken of the term "commerce" in the Act as relating to the purchase, sale, or exchange of commodities.) Consequently, the "trade or commerce" element of the Act does not apply to all transactions, but rather to those transactions that can be characterized as "business" or "commercial." *See e.g., United States v. Brown Univ.,* 5 F.3d 658, 665 (3d Cir. 1993) (analyzing a § 1 claim and finding that "[i]t is axiomatic that section one of the Sherman Act regulates only transactions that are commercial in nature.")

Non-profit organizations are not per se entitled to exemption from the Sherman Act. However, when these organizations "perform acts that are the antithesis of

commercial activity, they are immune from antitrust regulation." *Id.* "The legislative history of the Sherman Act reveals that it was not intended to reach noncommercial activities that are intended to promote social causes." *Hamilton College,* 128 F.3d at 63; *see also D.E.L.T.A.,* 50 F.3d at 713.

A court will examine the nature of the conduct of the non-profit organization and the totality of the circumstances in determining if a transaction is business or commercial, and thus subject to Sherman Act liability. *See Brown Univ.,* 5 F.3d at 666. The exchange of money for services is the hallmark of a commercial transaction. *See id.* Consequently, in *Brown Univ.,* the Third Circuit found that when a non-profit university offers a student financial aid, the university has engaged in commercial activity, as the student by accepting the financial aid package, must make a complementary payment to the university of the remaining balance of the tuition not covered by financial aid. *See id.*

In this case, even taking plaintiff's allegations as true, which this Court must on a motion to dismiss, plaintiff still does not allege any facts that could support its anti-trust claims. Defendants' actions, as alleged, are purely non-commercial. There is no exchange of money for services here, or anything else akin to a business or commercial transaction. Although LSC provides federal funds to LSNY, LSC does not receive anything in return from LSNY. Likewise, when LSNY passes those funds down to BLS, LSNY does not receive anything in return from plaintiff for this money. Rather, BLS uses the money to provide free legal services to the indigent population in the Bronx. Rather than a business

or commercial exchange, this situation is more akin to a series of charitable gifts from one party to another.

Further, plaintiff has not alleged, and could not possibly allege, that anything about the relationship between the parties or the reorganization plan will cause any of the harms the Sherman Act was intended to prevent, such as restriction of the product (here, legal services), a raise in prices, or other controls on the market that are to the detriment of the consumer (here, the indigent Bronx population). There has been no allegation that, if BLS becomes a wholly-owned subsidiary of LSNY, it will adversely affect the availability of attorneys or that the legal services will no longer remain free to the indigent. In short, LSNY's plan to reorganize the provision of free legal services to the indigent in New York City is not "trade or commerce" within the meaning of the Sherman Act as the plan fits squarely within the type of social causes that are exempt from regulation by the Act. Therefore, defendants' motions to dismiss plaintiff's § 1 and § 2 Sherman Act claims, as well as plaintiff's Donnelly Act claim are granted.

First Amendment Retaliation Claim

Plaintiff argues that LSNY, as the result of pressure from LSC, instituted its reorganization plan to retaliate against BLS for filing a previous lawsuit against defendants in May 2000. In that lawsuit, brought by both BLS and Queens Legal Services, the plaintiffs there sought injunctive relief preventing defendants from requiring them to disclose the full names of their clients and the nature of the representation on the grounds that such disclosure would violate their ethical

and professional responsibilities. Plaintiffs in that suit further sought to enjoin defendants from terminating their LSC funds as the result of their refusal to provide such information.[5]

A plaintiff asserting a First Amendment retaliation claim must put forth non-conclusory allegations: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Garcia v. S.U.N.Y. Health Sciences Cntr.*, 280 F.3d 98, 106-07 (2d Cir. 2001); *Diesel v. Town of Lewisboro*, 232 F.3d 92, 107 (2d Cir. 2000).

With respect to LSC, plaintiff has failed to allege a set of facts sufficient to meet the third element of the test for retaliation, namely a causal connection between plaintiff's filing of the May 2000 lawsuit and LSNY's adoption of the reorganization plan. The Complaint states that as early as 1998, LSC had embarked on a program to coordinate and integrate the provision of legal services on a unified statewide basis throughout the country. In fact, in the summer of 1998, the Complaint alleges that LSC had met with LSNY to discuss LSC's initiative to consolidate legal services in New York City. The Complaint further states that between 1998 and 2001, the number of legal services organizations nationwide receiving LSC funds dropped from 262 to 207. Thus, it is clear from the Complaint that LSC began the consolidation initiative long before BLS had filed the May 2000 lawsuit.

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5. In an order dated August 8, 2002, this Court granted defendants' motions for summary judgment in that case and dismissed that Complaint in its entirety. *See Bronx Legal Servs. v. Legal Servs. Corp.*, No. 00 CIV. 3423, 2002 WL 1835597 (S.D.N.Y. Aug. 8, 2002).

It is just as clear that the consolidation initiative is nationwide, rather than an effort to target BLS or Queens Legal Services for bringing the May 2000 lawsuit.

Further, the September 5, 2000 letter from LSC to LSNY that plaintiff relies upon does not add support to plaintiff's argument. That letter, written by an LSC representative, neither mandates nor directs LSNY to consolidate on a city- wide basis. Rather, the letter proposes to LSNY at least four possible options so as to improve the quality of legal services to New York City indigent clients. The proposed options LSC gave to LSNY were: 1) create separate LSC- funded grantee programs; 2) transform LSNY into one city-wide program with offices as opposed to grantee agencies; 3) "make a compelling case" to continue with LSNY's current structure; or 4) develop "something else" to achieve the desired goal. LSC Br., Exh. B. The letter concludes by stating that LSNY must submit a proposal to LSC as to how it plans to restructure itself by March 1, 2001, and that if LSC is not satisfied with that proposal, LSC may choose to find some other mechanism to disperse grant funds in New York City. *Id.* It is clear that the possible city-wide consolidation discussed in the LSC letter was never in mandatory terms, and that LSC left it to the discretion of LSNY as to how to implement internal changes. Thus, even drawing all reasonable inferences in favor of plaintiff, there is no set of facts alleged in the Complaint which could support plaintiff's claim that LSC "coerced" LSNY into adopting its reorganization plan in order to retaliate against BLS for filing the May 2000 lawsuit.

With respect to LSNY, plaintiff has also failed to allege sufficient facts to establish a causal connection between the May 2000 lawsuit and the alleged retaliatory conduct. As noted above, plaintiff's Complaint alleges that LSC and LSNY began discussing reorganization and consolidation as early as 1998, a full two years before BLS filed the May 2000 lawsuit.

Furthermore, the history of the May 2000 lawsuit is inconsistent with plaintiff's contention that LSNY retaliated against BLS for filing that suit. In early January 2000, as part of an internal audit, LSC's Office of the Inspector General ("OIG") randomly selected thirty grantee organizations and asked them to provide certain information regarding the cases they handled, including client names. LSNY was one of the thirty randomly selected grantee organizations. Since LSNY has no clients, this information would have to come from its seven sub-grantee organizations. LSNY opposed this request as did another grantee organization that had been selected, the Legal Aid Bureau located in Baltimore, Maryland. BLS and Queens Legal Services, as two of LSNY's sub-grantee organizations, also opposed this reque[illegible]. On March 22, 2000, the OIG issued two administrative [illegible]ubpoenas requiring LSNY and the Baltimore Legal Aid Bureau to produce the information. On April 25, 2000, the OIG filed a petition in United States District Court for the District of Columbia for summary enforcement of those subpoenas.[6]

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6. Neither BLS nor Queens Legal Services were served with subpoenas, nor named as respondents in the enforcement proceeding in D.C. District Court.

BLS and Queens Legal Services feared that if LSC terminated LSNY's funding over this issue, they in turn would lose their funding. They then filed the May 2000 suit in this Court against both LSNY and LSC. As noted earlier, BLS and Queens Legal Services requested injunctive relief in that suit preventing defendants from requiring them from disclosing the full names of their clients and the nature of the representation. They also sought an injunction preventing defendants from terminating their LSC funds as a result of their refusal to provide such information. *See Bronx Legal Serv. v. Legal Serv. Corp.*, No. 00 CIV. 3423, 2002 WL 1835597, (S.D.N.Y. Aug. 8, 2002). One month after BLS filed the May 2000 suit, the D.C. District Court ruled on the OIG's petition, finding in favor of the OIG. *See United States v. Legal Serv. for New York City,* 100 F. Supp.2d 42 (D.D.C. 2000). LSNY appealed to the D .C. Circuit.[7] The district court's decision was affirmed on appeal on May 25, 2001. *See United States v. Legal Serv. for New York City,* 249 F.3d 1077 (D.C. Cir. 2001).

The history of the May 2000 lawsuit reveals that, at least until the D.C. Circuit's adverse ruling against LSNY in May 2001, LSNY had taken the same position as BLS on the issues relating to BLS's May 2000 lawsuit. Therefore, when LSNY received the September 5, 2000 letter, and when the LSNY Board of Directors voted in favor of city-wide consolidation in March 2001,[8] LSNY still favored plaintiff's position with respect to the issues BLS raised in the May 2000 lawsuit.

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7. The Legal Aid Bureau was not a party to the appeal.

8. *See* Thompson Aff. ¶ 73, Pl's Mot. for a Prelim. Inj.

In fact, LSNY did not give up its fight against the OIG with regard to the issue of disclosure until the D.C. Circuit ruled against LSNY, a full year after BLS had filed the May 2000 lawsuit. Therefore, the history of the May 2000 lawsuit belies plaintiff's contention that LSNY enacted the reorganization plan so as to retaliate against BLS for filing the May 2000 lawsuit.

Plaintiff further contends that the timing of LSNY's announcement in November 2001 of the reorganization plan to consolidate on a city-wide basis is evidence of retaliation against BLS for filing the May 2000 lawsuit. Although this announcement came after the D.C. Circuit's adverse ruling, the LSNY Board of Directors had voted eight months earlier in March 2001 to adopt the consolidation plan. That vote occurred while LSNY was still in active litigation against the OIG, and thus, while LSNY was still litigating in favor of plaintiff's position with regard to the issues raised in plaintiff's May 2000 lawsuit. The timing of the November 2001 announcement, therefore, fails to support plaintiff's argument. Plaintiff simply has not alleged any set of facts in the Complaint which could reasonably lead to a causal connection between plaintiff's filing of the May 2000 lawsuit and LSNY's decision to institute the reorganization plan. Therefore, defendants' motions to dismiss the First Amendment retaliation claim are granted.

The New York Judiciary Act Claim

Plaintiff argues that if it acquiesces to LSNY's reorganization plan, the plan will cause BLS to engage in the unauthorized practice of law, in violation of § 495(1) of

the New York Judiciary Act. The New York Judiciary Act prohibits any corporation from "practic[ing] or appear[ing] as an attorney-at-law for any person in any court in this state or before any judicial body[.]" N.Y. JUDICIARY ACT § 495(1) (McKinney 2002). However, § 495(7) of the Act provides an exemption for "organizations which have as their primary purpose the furnishing of legal services to indigent persons." *Id.* § 495(7). Plaintiff concedes that it, as well as LSNY, currently fall under the Act's exemption. Plaintiff claims, however, that if it is forced to become a wholly-owned subsidiary of LSNY, both BLS and LSNY would lose their exemption status.

Plaintiff's argument fails to state a claim for two reasons. First, § 476-a of the Act states that only the Attorney General or a bar association formed in accordance with New York law are authorized to bring a civil action for unlawful practice of law. *See Id.* at § 476-a; *Lawrence v. Houston,* 567 N.Y.S.2d 962, 964 (N.Y. App. Div. 1991). Plaintiff, therefore, does not have standing to bring this cause of action. Second, even if plaintiff did have standing, plaintiff's contention that both BLS and LSNY would lose their exemption status because plaintiff would now be subject to the "corporate control" of LSNY is insufficient to state a claim. Even if BLS becomes a wholly-owned subsidiary of LSNY, the primary purpose of both organizations will remain the same, namely to furnish legal services to indigent persons. Thus the exemption under § 495(7) will still apply. Plaintiff has not alleged any set of facts that would cause BLS or LSNY to fall outside of § 495(7) exemption. Therefore, defendants' motions to dismiss the New York Judiciary Act claim are granted.

Appendix B

The Breach of Fiduciary Duty Claim

Plaintiff contends that LSNY owes BLS a fiduciary duty, and that LSNY and LSC conspired to breach that fiduciary duty. Plaintiff contends that the fiduciary relationship arose because BLS and LSNY are parties to a joint venture.

Parties to a joint venture owe one another a fiduciary duty. *See Gover v. Escudo Constr. Corp.*, 733 N.Y.S.2d 894 (N.Y. App. Div. 2001). In determining if a joint venture exists, a court will consider "the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was a sharing of the profits as well as a sharing of the losses and whether there was a combination of property, skill or knowledge." *Mendelson v. Feinman,* 531 N.Y.S.2d 326, 328 (N.Y. App. Div. 1988). If the contract does not expressly impose fiduciary duties, plaintiff bears the burden of alleging extraordinary circumstances that create a fiduciary relationship. *See Calvin Klein Trademark Trust v. Wachner,* 123 F. Supp.2d 731, 733-34 (S.D.N.Y. 2000).

The Complaint fails to allege any facts that would establish a joint venture between BLS and LSNY. The governing 2001 contract between BLS and LSNY explicitly disavows any partnership relationship, stating that "nothing herein shall constitute a partnership between the OLSC[9] and LSNY or any relationship of principal and agent

9. "OLSC" stands for Operating Legal Services Corporation. This is the term given to the seven legal services organizations in New York City (including BLS) that sub-contracted with LSNY to receive LSC funds.

between the OLSC and LSNY." LSNY Br., Exh. B at § 14.9. The contract also provides LSNY with the "authority in its discretion either independently or in consultation with representatives of the OLSC" to institute "program modification and reorganization on a city-wide basis or otherwise[.]" *Id.* at § 11.1. The contract further states that the contract "constitutes the entire agreement of the parties relating to the subject matter hereof." *Id.* at § 14.12. The terms of the contract do not create a fiduciary relationship, and plaintiff has not alleged any extraordinary circumstances to overcome the language in the contract. Therefore, defendants' motions to dismiss the breach of fiduciary duty claim are granted as LSNY had no fiduciary relationship with BLS in the first instance.[10]

The Tortious Interference with Business Relations Claim

Plaintiff argues that LSNY's reorganization plan constitutes tortious interference with plaintiff's business relations, and that LSC conspired with LSNY to implement this plan. Plaintiff contends that by adopting this plan, LSNY intends to appropriate for itself all of plaintiff's funding opportunities and contracts, as well as hire away all of BLS's employees.

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10. Plaintiff's breach of fiduciary duty claim against LSC is based upon its allegation that LSC "conspired" with LSNY to breach LSNY's fiduciary duties to plaintiff. However, conspiracy to commit a tort is not in itself a cause of action under New York law. *See Alexander & Alexander v. Fritzen,* 503 N.E.2d 102 (N.Y.1986). Therefore, the claim against LSC for conspiracy to breach the fiduciary relationship must also fail for this separate and independent reason. For the same reasons, plaintiff's "conspiracy" claim against LSC for tortious interference with business relations must also fail.

Appendix B

To prove tortious interference with business relations, a plaintiff must show, *inter alia,* the existence of a business relationship between the plaintiff and a third party. *See Boule v. Hutton,* 138 F. Supp.2d 491, 510 (S.D.N.Y. 2001). Plaintiff must allege that the defendant interfered with a *specific* contract, rather than generally with the plaintiff's business opportunities. *See Kramer v. Pollock-Krasner Found.,* 890 F. Supp. 250, 258 (S.D.N.Y. 1995); *see e.g., Lesesne v. Lesesne,* 740 N.Y.S.2d 352, 354 (N.Y. App. Div. 2002) (affirming dismissal of tortious interference claim because plaintiff failed to allege breach of a specific contract between the plaintiff and a third party).

In this case, plaintiff has failed to allege that LSNY interfered with a specific contract it had with a third party. Rather, the Complaint only generally alleges that LSNY intends to appropriate for itself all of plaintiff's current funding opportunities and contracts, and hire away all of plaintiff's employees. Such generalized allegations are insufficient as a matter of law to sustain a tortious interference of business relations claim. Therefore, defendants' motions to dismiss the tortious interference with business relations claim are granted.

Appendix B

Conclusion

Defendants' motions to dismiss the Complaint and for judgment on the pleadings are granted in their entirety for the reasons stated above.[11]

Dated: New York, New York

January 17, 2003

SO ORDERED:

s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

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11. Plaintiff's request for leave to amend the Complaint in the event any of its claims are found deficient is denied. Plaintiff has also filed a motion for Preliminary Injunction enjoining LSNY from withholding grant funding from BLS after January 1, 2003. That motion is based solely upon plaintiff's claims for breach of fiduciary duty and tortious interference with business relations. As today's decision disposes of all claims in favor of defendants, plaintiff's motion for a Preliminary Injunction is also denied.